

UTAH SCHOOL LAW UPDATE

Utah State Office of Education

March 2011

Tweets, Twits, and Twaddle

Not so long ago, a public employee could spend an entire career without ever worrying that an off-hand comment would land on the local news.

Today, off-hand comments may still not make headlines, but a casual remark may take on a life of its own, being tweeted far and wide into the blogosphere.

The ever-expanding social media universe makes it more imperative that public employees understand who is listening to their conversations and maintain professionalism in those conversations. The following are a few guidelines to consider when speaking on district or school matters in meetings, groups, or online:

* Consider who is or may be listening in: An emplovee was speaking with colleagues during a break at a conference. The employee, thinking she was among friends, made a flippant remark about her supervisor. The employee did not consider that she was surrounded by other education professionals who could overhear her remarks. One of those less-than professional professionals immediately tweeted the remark to his many followers. one of whom happened to be the spouse of the employee's supervisor.

- * Make sure you understand the context of a remark before personally sending it into cyber space: An educator attending a local board meeting walked in during the middle of a board discussion. One board member made a remark which, in the context of the entire discussion was one of several remotely possible outcomes of the board's potential decision. The educator tweeted the comment as if it were the board's opinion. While an audience member may have some rights to tweet inaccurate information, an employee of the board could not present a board comment as an official board opinion without board approval.
- * Consider your environment: While employees should always be professional in their work-related conversations, extra care should be taken when the employee is speaking in unfamiliar territory: An employee was attending a meeting with representatives from several organizations. The employee knew one or two of her fellow

participants, but not all. The employee made several remarks denigrating another teacher at her school. One of the participants the employee did not know had friends at the school. That participant emailed the comments to her friends.

- * Don't talk shop on personal social media sites: An employee's personal blog site included several meanspirited comments about her supervisor. A fellow employee saw the blog posts and tweeted some of the items. The supervisor received the tweets. The employee was terminated.
- * You are an employee first (if you value your job) and a member of political, religious, philosophical and/or social groups second. Use caution when speaking in professional meetings or conversations (even side conversations) about your personal religious convictions, your great love or disdain for political figures or perspectives, or your undying commitment to socialism, atheism or entrepreneurialism. You may be overheard, misheard and rebroadcast!

Inside this issue:

UPPAC Case of the Month	2
Eye on Legislation	2
Recent Education	3
Your Questions	3



UPPAC CASES

The Utah State Board of Education did not take any action on educators' licenses this month. However, UPPAC sent a letter of reprimand to Superintendent George Park for approving travel reimbursements without proper documentation and failure to follow Utah Open Meetings Act.

UPPAC also sent a letter of reprimand to Principal Heather Nicholas for failing to follow district policies regarding the use of public funds for personal purchases and for tokens of appreciation, and for failing to adequately documents expenses or require adequate documentation for reimbursement. Ms. Nicholas is on probation for 18 months for her actions.

Eye on Legislation

When people say "it's not about the money," often we find it REALLY is about the money. For the last three years, Utah public schools have experienced the fate of the rest of the country—we have tightened our belts, cut programs and implemented new legislative requirements. This year, there was a modest increase in funding in public education—for the first time in three years. But the funding increase came in funding directed to specific legislative priorities. Some of the legislative priorities coincided with public education priorities.

- The Utah Common Core, a stateinitiated plan to synchronize core academic standards across multiple states, received \$2 million.
- The line item that provides a helpful stipend to teachers for classroom supplies (this year the money will be directed first to beginning teachers) received \$5 million.
 - A number of programs for stu-

dents at risk were consolidated and received \$22.4 million—a 8.2 million reduction from last year.

Several new legislative ideas received specific funding:

- Online education programs—with expanded providers—received \$250,000.
- A new program that will grade schools with A, B, C, D and F grades received \$418,300.
- A specific 6th grade math assessment (in an ongoing effort to encourage math/science/technology programs) received \$750,000.
- K-3 reading efforts received the \$15 million annual appropriation. This year *up to* \$7.5 million will go to vendor(s) for reading program technology.

All bills and resolutions that would have dramatically changed state governance of public education failed, in keeping with the will of 78% of voters who support the cur-

rent State Board of Education governance

Several bills focused on the PUB-LIC nature of public school boards and schools: the use of public schools for political caucus meetings (schools should accommodate); the use of public school "facilities" (instead of buildings) by non-curriculum school clubs (upon approval of the school); school community council members must provide telephone numbers and email addresses (if available); and school boards must establish rules of procedure that include civil discourse. The traditional concepts of to-andfrom public school busing and high school activity/athletic programs as we have known them, non-partisan local and state boards of education and local property tax funds diverted for charter schools escaped legislative approval for another year.

UPPAC Case of the Month

Disciplining students through the use of violence or force has never been, and should never be, an option in Utah schools. Recently, a handful of cases have come before the Commission that have involved unreasonable force, although in each instance the educator's actions were for very different reasons. One educator had a history of snapping in the face of belligerence and lack of respect. On one occasion, this educator grabbed an individual (who was not a student but a former student on campus and was with other current students) by the neck when the individual made derogatory comments about the educator's family. On another occasion, he forced a student down a hallway when the student was making threatening and insulting gestures from another classroom at the educator's PE class. Another educator knocked a student's hat off when the student told the teacher her involvement wasn't any of her "f-ing" business.

Some educators inadvertently harm students when trying to joke around through horseplay. One particular educator, in joking with her 6th grade boys, placed some tape over the mouth of a student who wouldn't stop talking. Unfortunately, the boy was allergic to latex and developed a rash from under his eyes to his chin. In another seemingly harmless incident, the educator grabbed a rubber band that a boy had placed on his head, and it accidentally snapped, causing a large welt to develop on the boy's forehead.

Still other educators end up using unreasonable force because they push students into a corner and leave no room for a graceful exit. In one such case, an educator instructed a student to report to the office for inappropriate comments the student made in class. When the student stood up to leave, the educator was situated between the student and the door in such a way that the

student could not leave the room without a square off. The teacher and student butted shoulders and chests and while no physical altercation actually occurred, the teacher was written up and sent to our office for disciplinary action on his license.

While case law suggests that insubstantial incidents, or reflexive or defense actions may not justify dismissal, it is always an inappropriate method of discipline to use physical force.

Whether a student is particularly out of line and "deserves it," whether the educator is just playing around, or whether the student puts himself into a corner with no option but physical contact, the educator is responsible for maintaining professionalism and refraining from any semblance of violence or force.

Utah State Office of Education Page 2

Recent Education Case

Doe v. Banos, (3d Circuit 2010) A parent of a student athlete claimed that a district policy requiring parents to sign permission slips acknowledging the school's policy on alcohol and drugs was a violation of the parent's First Amendment rights of free speech. In Haddonfield, New Jersey, the board of education adopted a comprehensive drug policy that bans students from any contact with drugs or alcohol, 24 hours a day, 7 days a week. In order for Haddonfield students to participate in any extracurricular activity, both the student and the student's parents must sign a permission form acknowledging the 24/7 drug policy. Jane Doe, a 15-year old sophomore wishing to play lacrosse, submitted a signed permission form, but her father had crossed out certain language on the form pertaining to the drug policy. The board of education informed Mr. Doe that the form, as modified, would not be accepted and so Mr. Doe then submitted an unmodified signed permission form but attached a cover letter stating he had signed the form under duress. He explained that he would not agree to be bound to a policy he believed to be illegal. Mr. Doe

refused requests by the Board to rescind his cover letter statement or to change the language from "under duress" to "with full reservation of rights," and consequently, the Board did not allow Jane Doe to participate on the lacrosse team. In his lawsuit, Mr. Doe alleged that the board violated his First Amendment right to freedom of speech and expression by preventing his daughter from participating in extracurricular activities on the basis of a letter he sent along with the signed permission form. He asked the court for an injunction prohibiting the Board from excluding Jan Doe's participation on the lacrosse team.

Mr. Doe based his arguments on two theories: (1) that this is a case involving forced speech or an attempt to compel speech, and (2) that the government is censoring his speech and forcing him to choose between quietly criticizing a governmental policy or being pressured through the punishment of his daughter to retract his criticism. Both theories were rejected by the court.

The court explained with regard to theory #1 that the only speech being

"compelled" in this case was John Doe's unqualified signature on the permission form, which, among other things provides permission for his daughter to participate in lacrosse and acknowledges the drug policy. The court noted "The First Amendment does not protect a parent's right to sign a school permission "under duress" while still mandating that the school allow his or her child to participate in the underlying activity." With regard to the second theory, the court held it found no evidence that John Doe's ability to criticize the drug policy was inhibited in any manner whatsoever. John Doe's signature neither "required him to indicate he agreed with the substance of the [drug policy] nor prevented him from criticizing the policy in any wav."

Your Questions

Q: The local high school has a day care program that is part of the school's child development class. The program charges fees for toddlers to attend. Is that okay? Can I have the fee waived?

A: A school can charge for the day care services provided the fee is approved by the local school board. A day care fee should cover the costs of the program, and should not be designed to make a profit.

The school is not required to provide fee waivers for children in the day care. Fee waivers apply to students in elementary and secondary schools, not day care facilities.

Q: Our school would like to offer a running program called Girls on the Run. As the name suggests, the program is limited

What do you do when...?

to female students. May we offer this program?

A: Yes. Title IX requires equal opportunities for male and female students. This does not mean, however, that schools must match every program for one gender with the same program for the other. For example, a school may have a boys' wrestling team without also offering a girls' wrestling team as long as there are an equal number of other sports options for the female students.

The school, therefore, can offer the

Girls on the Run program, provided there are other sports options for the boys. Those options need not be gender specific either. If there is a coed sport, the school can consider it as one of its options for its male students.

Q: We may terminate a teacher. The teacher has asked us to sign an agreement that the teacher will quit and the school won't go forward with a termination. Should we enter into this agreement?

A: Morris Haggerty of Risk Management responds: These release agreements have several objectionable components.

First, these releases often say that they are confidential except as pro-

Utah State Office of Education Page 3

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The Utah Professional Practices Advisory Commission, as an advisory commission to the Utah State Board of Education, sets standards of professional performance, competence and ethical conduct for persons holding licenses issued by the Board.

The Government and Legislative Relations Section at the Utah State Office of provides information, direction and support to school districts, other state agencies, teachers and the general public on current legal issues, public education law, educator discipline, professional standards, and legislation.

Our website also provides information such as Board and UPPAC rules, model forms, reporting forms for alleged educator misconduct, curriculum guides, licensing information, NCLB information, statistical information about Utah schools and districts and links to each department at the state office.

Your Questions Cont.

vided by law. A release is not confidential, it is a public document and may be requested pursuant to GRAMA. Saying it is confidential leads to bad news stories--"In a matter the school district tried to withhold from the public" Also, if GRAMA is not specifically mentioned the employee is surprised when the release is disseminated and tries to make a breach of contract claim. Risk recommends that releases not contain a confidentiality clause, or at least specifically mention that the release will be disseminated if a GRAMA request is made.

Second, these releases say that the school district will not say anything about the teacher's employment except dates of employment and salary or something along those lines. A school district cannot guarantee this.

While the top administration might know of the settlement agreement, lower levels do not. So, if a call comes in to someone who doesn't know of the agreement and the employee does not stick to the agreed upon script, there is a breach of contract lawsuit.

Risk recommends the following clause instead: "Doe shall direct all inquiries regarding his employment or seeking an employment reference to [designated person]. [Designated person] shall respond by providing the following: [list response]. If employment inquiries or requests for references are made to other persons, [employer] will endeavor to direct the inquiry to [designated person] but if another person is contacted Doe acknowledges that [employer] cannot be responsible for what that person may say."

Third, some of these releases contain a mutual non-disparagement clause. We recommend against such mutual clauses because they are vague. For example, a charter school recently entered into a release containing such a clause.

When asked why the administrator left, the school said he resigned in lieu of termination. Disparaging? Probably. Covered by Risk? No.

If the need for a release arises, contact Risk. Risk Management would be happy to help structure releases for these types of situations and then Risk can back them up.

Utah State Office of Education Page 4